BOOK REVIEWS

PROBLEMS OF LAW: ITS PAST, PRESENT, AND FUTURE. By John Henry Wigmore. University of Virginia Lectures on the Barbour-Page Foundation. New York: Charles Scribner's Sons. 1920. Pp. vii, 136.

Although the three lectures contained in this volume are propounded as a "trinity," the reader will not find in them that unity which is of the essence of a trinity, as distinguished from an aggregate of three. The author proposes a "triune division" of legal science, Past, Present, and Future. But the first lecture deals with a particular phase of the past, the second with a remotely related phase of the present, and the last with a quite unrelated phase of the future, so that they have little in common, save the brilliance that sparkles through them all.

The first lecture deals with the evolution of law, and is essentially a critique of prevalent methods and conclusions in this field. The author goes gunning for easy generalizations. "Does evolution mean necessarily progress?" "Do these scholars assume constancy in the evolution of a specific legal institution in all epochs and all communities?" "Do these scholars assume universality of a formula of evolution throughout all legal ideas?" With such simple questions, and a few recalcitrant facts of legal history, De la Grasserie's twenty-eight (count them) canons of evolution are brought crashing to earth, and even Sir Henry Maine's modest ventures in generalization are sadly shaken. Turning to attempts at graphic representation of legal evolution, the author easily demolishes all the curves that have been plotted, from the straight perpendicular line to Goethe's ascending spiral, and, in spite of a labored demonstration in which the author figures as a gyroscopic top, he convinces us that nothing less complex than the planetary system can adequately express the evolution of law. A synopsis of a rigidly scientific method of study leaves us aghast at the task. We feel that Dean Wigmore has spoken the last word upon universal principles of evolution when he says, "All we can assume is the universality of identical effects from identical causes." The last word, because identical causes have never existed and never will. Sadly we surrender universal truth, but consolation we may find in the thought that some of our cherished generalizations may still carry helpful suggestion, or at least provide a useful phrase. "Status to contract" may aid in an understanding of the facts that we see, whether they involve movements from status to contract or from contract to status.

The second lecture is the most interesting and the most vital of the three. Its subject is the mechanism for making law and administering justice. Stripped of illustration and minor argument, and hence of much of its vigor, the lecture runs thus: Though there is no bright line between legislative and judicial functions, there is an inherent contrast between the declaration of abstract rules (law making) and the application of the rules to concrete

situations (administration of justice). "The great problem is how to preserve both. Experience has taught us that masses of men *must* be ruled by general principles; but it has also taught us that these generalities are merely abstractions and ignore concrete realities, and therefore will sometimes lead to results undesirable because inconsistent with the merits of the individual case when surveyed in all its circumstances. Hence the problem is to combine rigidity with flexibility." Human limitations render it impossible to embody in legislation, through detailed provisions, that adaptability to varied circumstances which justice requires. *A fortiori,* it is impossible to provide in advance for change of general conditions. And these observations apply not only to legislative law making by statute, but also to judicial law making by precedent. From these conditions, it results that the law, thus made, cannot decently be applied to many of the situations which present themselves in the administration of justice. And our traditional remedy of appealing to the legislature for a change of law is fraught with such practical difficulties that relief comes tardily, if at all. So far, probably all will agree with the author, but the remedy suggested leads to more debatable ground. Relief is to be sought in enlargement of the judicial function. Two questions are propounded. "Is it necessary that the judge should be the intellectual slave—(*a*) of the legislators? (*b*) of the judge's own precedent?" The answer is negative. The judge should be vested with a general power to "flex the statute," and *stare decisis* confined to those rules of property and contract which require stability. "*Stare decisis* is said to be indispensable for securing certainty in the application of the law. But the sufficient answer is that it has not in fact secured it. Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves,—the government of the living by the dead, as Herbert Spencer has called it." The brief lecture perhaps overstates (and this summary certainly exaggerates) the opinion really entertained by Dean Wigmore. He expressly concedes the value of *stare decisis* in the field of property and contract. In other fields, we do not understand him to deny that *stare decisis* is a principle entitled to some weight. "It is the absolute and universal rigidity of the principle that is unsound." "The change in scope of reasoning would not necessarily be as cataclysmal as it might seem. There will always be a controlling intellectual influence by the settled law, wherever a professional class fills the bench." "The statute would remain in force, and in most cases would be rigidly enforced." In spite of the more radical tone of some vivid passages, these sentences, gathered from several parts of the lecture, lead us to believe that, when all returns are in, we have merely an appeal for a *larger* exercise of judicial reason and common sense, and a *less rigid* adherence to precedent and the letter of statutes. Perhaps it comes only to a vigorous arraignment of pettifogging judges, and a prayer for more Mansfields, more Storys, and more Holmes. For these matters have always been largely affected by the personal equation. The larger mind, with a firmer grasp of legal principles,

a livelier realization that law is a function of society, and a broader understanding of all human affairs, has always struck out more boldly into the realms of reason and justice and policy. The smaller mind, dizzied by those uncharted heavens (if indeed it is conscious of their existence), clings to the *terra firma* of statute and precedent. The lecture ends with emphasis upon the need of legislators of greater intelligence and better training. This is the heart of the legislative problem. The other great need, which is suggested though not emphasized in the lecture, is the need of judges of high intelligence, broad outlook, and abundant courage. This is the heart of the judicial problem.

In his third lecture, entitled "Problems of World-Legislation and America's Share Therein," the author points out the great importance for the future of the movement which aims to secure uniformity, particularly in the field of commercial law, among the national laws of the several countries. Of the various methods by which uniformity has been and may be obtained, he regards uniform national legislation as the only one likely to be adequate. How, he inquires, may the United States take an effective part in securing uniformity by national legislation? Attention is invited to three assertions: first, that Congress has no power, either by virtue of its authority over interstate and foreign commerce or by virtue of the treaty power, to adopt a uniform international rule which shall be actually effective throughout the country; second, that the several state legislatures have the power but they never have and never will unitedly exercise it; and third, that the state legislatures may accomplish the desired results by availing themselves of their constitutional liberty, under Art. I, Sec. 10, to make agreements or compacts with foreign countries with the consent of Congress. The author concludes that "it is therefore absolutely necessary for the future international self-respect of this country that this power should be promptly exercised by the leading commercial states of the United States."

These assertions will arouse interest and provoke controversy. Need we despair utterly, it may well be asked, of the national treaty power? Is it not altogether likely that we shall dawdle along until increased international interdependence finally compels us to coöperate effectively? And as that time approaches may we not find it quite as constitutional and much more expedient to coöperate through the national treaty power, a power which certainly ought to comprehend everything that is "properly the subject of negotiation with a foreign country"? In the meantime, Dean Wigmore has rendered a distinctive service in challenging our attention to a problem of the first magnitude. His assertions and the questions which they are bound to provoke deserve the most careful as well as prayerful consideration.

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